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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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MAY 21 1997

FCC MAIL ROOM

In the Matter of )  
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RULES PROMOTING )  
EFFICIENT USE, )  
FAIR DISTRIBUTION )  
OF TOLL-FREE NUMBERS )

REPORT NO. CC 97-17  
CC DOCKET NO. 95-155 /

**PETITION FOR STAY AND RECONSIDERATION**

Loren C. Stocker, Managing Partner of Vanity International, hereby seeks an immediate stay and reconsideration of the referenced sections of the Report and Order dated April 4, 1997 on behalf our firm, our clients, and the general public.

Specifically, we request that the Commission vacate that portion of its decision that authorizes Carriers and/or Responsible Organizations (RespOrgs) to disconnect the toll-free numbers services of suspected "hoarders" without the benefit of notice, hearing or due process. Second, we request that the Commission vacate that portion of its rulemaking that creates a "rebuttable presumption" that any toll-free subscriber with "more than one toll-free number" is presumed to be illegally "hoarding" toll-free numbers. Third, we request that the Commission vacate that portion of its rulemaking that discriminates against toll-free subscribers in the exercise of their rights under the Telecommunications Act of 1996 as "telecommunications end-users", and who are prescribed by Congress to have the right to "retain their telecommunications numbers" with full and unfettered "number portability."

Our company is uniquely positioned to view the scope of this situation as we consult to both large, Fortune 500, companies and small companies that subscribe to 800 service. Recently, we launched 800-SoftLine<sup>sm</sup> and SoftLine<sup>sm</sup> Studios which are dedicated to the deployment and development of multi-channel commerce. The SoftLine<sup>sm</sup> enterprise is basically an incubator for baby businesses aspiring to become the next 800-Flowers, each employing branded toll-free numbers, Internet domain addresses, and interactive services. I wish to focus my comments principally on the "Hoarding and Brokering" ruling which I find most anti-competitive and contrary to the public interest, if not outright unlawful and unconstitutional.

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## **DEFECTIVE INDICATOR/PROCEDURE**

It seems abundantly clear that the Common Carrier Bureau has overstepped its role as public servant and lost sight of its stated goal "to make allocation of toll-free numbers a fair and equitable process." Perhaps someone mixed up the acronym; it's FCC, not FBI.

My understanding is that the FCC is chartered to inquire into the affairs of regulated telecommunications suppliers, but not the private affairs of citizens and businesses – especially without probable cause. This "rebuttable presumption" based on "multiple toll-free numbers" suggests unconscionable power to suspend a toll-free subscription and associated intellectual property without due process. In effect, anyone with two or more numbers is considered guilty until proven otherwise.

The simple use of multiple toll-free numbers is a *defective indicator* of hoarding or brokering. In fact, the use of multiple toll-free numbers is an everyday business practice. Virtually every savvy advertiser in America tracks their media performance using unique toll-free numbers for each medium. Frequent advertisers use hundreds if not thousands of toll-free numbers for this purpose – all terminating to a "single toll-free subscriber." The use of multiple toll-free numbers is the status quo in American media.

Essentially, the FCC has no business dictating the number of toll-free numbers a business can use any more than the United States Post Service (USPS) should involve themselves in prescribing how many addresses a business can use. If the Commission "finds that the incentive already exists" for service providers to minimize the use of toll-free numbers (i.e. the \$0.70 monthly fee), then let economics dictate this business decision as well.

## **ABUSE OF POWER**

I fear the Commission has lost sight how such power in the hands of Carriers and/or RespOrgs will be abused by selective enforcement. Recent experience has shown that Carriers and/or RespOrgs will unfairly apply such rules as they did when they selectively invited participation in the 888 set-aside (See *ExParte Comments of Vanity International*, January 19, 1996, and *Emergency Motion for Stay*, February 29, 1996). The Commission can be certain that no Carrier and/or RespOrg will ever question the use of thousands of toll-free numbers by their large, Fortune 500 customers. This hostile and anticompetitive ruling will only be harmful to the very start-up businesses Congress is hoping to spawn.

The fact is that Carriers and/or RespOrgs would like the power to seize toll-free numbers from smaller clients and give them to their most favorite customers. Combined with "snap back" privileges, Carriers and/or RespOrgs would be back in the business of power brokering as they were before portability. The FCC should both stay subject ruling 52.107 and uphold 52.103d that requires Carriers and/or RespOrgs to drop disconnected numbers into the general pool for "first-come, first-service" assignment. Anything less would make the FCC party to this transparent campaign to engage in the redistribution of wealth.

The prevailing big business attitude is clearly reflected in the comments of TicketMaster (a.k.a. *Bass Tickets, Inc.*) who sought to acquire a toll-free number from another subscriber, but was unwilling to buy out their interests. You will note that it was TicketMaster who "inquired about the availability of the number," not the other way around (see "*Comments of Bass Tickets, Inc.*"). Subsequently, TicketMaster appealed to the Commission to make toll-free numbers prohibitively expensive to all but a select few.

Those businesses and individuals who had the foresight to secure excellent toll-free numbers, either vanity or numeric, have every right to use and develop those numbers as those who had the foresight to homestead on oceanfront property. Ethically, how can a Commission that is unwilling to interfere with even the 800 numbers used by school children and others with pagers (i.e. without PIN codes), seize numbers from legitimate entrepreneurs who have demonstrated no intent to hoard or broker? It's too bad numbers are in short supply, but the contract with public was on a "first-come, first-serve" and assignments cannot now be revoked. Furthermore, the Commission is acutely aware that it was the Carriers and/or RespOrgs who "ran the bank" during the final weeks of unrestricted 800 number access, not subscribers.

#### **ABUSE OF PRIVILEGE**

I do agree, support, and welcome the FCC's authority to step in where subscribers are abusing the privilege of their toll-free subscription; specifically, subscribing to toll-free numbers with no intent but to sell. This behavior is an obvious obstruction to the "fair and equitable allocation of toll-free numbers.

A toll-free subscription, in my view, is analogous to homesteading where there was one cardinal rule: to gain ownership you had to *live* (i.e., use) on the property. Speculators could not lay a claim to land and immediately sell it off as real estate, having never set foot on the soil. The homesteading rule protected the public interest and ensured that land was freely available to those who had a bona fide intent to use the property. Similarly, toll-free numbers have been, and should remain, available on a "first-come, first-serve," non-discriminatory basis. The rule for toll-free numbers should be just as rational; you want it, you got it – just use it as your own.

Abuse should be investigated only where there is *probable cause* that a number is being held only for the purposes of sale as evidenced by a *verbal or written solicitation of sale of a toll-free number alone without any bona fide program, service, or enterprise*. The plain meaning of this proposed language is that the *subscriber* must clearly demonstrate the intent to sell a toll-free number and that any compensation suggested must be *solely* for the release of the toll-free number; not to reprint business materials, alert a client base, acquire intellectual properties in any form (i.e. business plans, trademarks, or client list), or acquire real assets.

If an inquiry is indicated by clear, compelling, and objective evidence, the 800 subscription should only be placed on-hold pending outcome if the number is inactivate to

begin with. Under no circumstance should live 800 service be suspended or a number assignment revoked without due process.

Great caution should be exercised so that alleged offenders are not only given due process, but not victimized by the regulation. In the attempted acquisition by TicketMaster (*Comments of Bass Tickets, Inc.*), for example, no action is indicated as the *buyer* initiated contact and solicited the release. Therefore, any evidence brought before the Commission should be dismissed, as the toll-free subscriber demonstrated no intent to sell prior to Ticketmaster's (a.k.a. *Bass Tickets*) contact. Buyers should not have standing to complain about transactions that they initiate. This stipulation prevents disgruntled buyers from appealing to the FCC each time a negotiation fails.

### **THE CONTINUING FICTION OF A PUBLIC RESOURCE**

Further, whenever a number is part of a program, service, or enterprise then the subscription can no longer be assumed a public good or resource. It is *pure fantasy* that a \$250 million company like 800-Flowers is built upon a "public resource" without foundation and subject to the prevailing whims of the Commission. The full scope of ownership is clearly outside the authority of the Commission alone, as the issues involved are not purely telecommunication.

The truth is that when Jim McCann (*Founder and President of 800-Flowers*) pays his phone bill, he pays for the subscription of the numeric 800-356-9377 -- not what it spells (i.e., *800-Flowers*). Further, he has a reasonable expectation that the subscription will continue indefinitely. Even if Mr. McCann fails to make payment, he has up to four months to recover the subscription. The simple fact is that the intellectual property "800-Flowers" was *created* and overlaid upon a lifetime subscription; it was neither issued by the Carrier and/or RespOrg or part of the toll-free subscription. The same fundamentals apply to branded programs like 800-Collect and, in their most basic form, to a client list developed from the simple use of toll-free numbers in commerce.

It should be clear to all that intellectual property is not a public resource, but neither is the control of a lifetime subscription. The Telecommunications Act of 1996 ensures that 800-Flowers has the right to "retain their telecommunications numbers" with full and unfettered "number portability." What then supports the legal fiction that assigned numbers are a "public resource?"

In my view only *unassigned* toll-free numbers are a public resource -- just as Government land was unquestionably a public resource prior to homesteading. In stark contrast, companies, programs, and services like 800-Flowers, 800-Collect, and others can be sold and the subscription reassigned without any lawful interference by the Commission, Carriers and/or RespOrgs. The Commission has only a fictional standing in the matter and could be enjoined by the courts to prevent interference.

Rather, it is the *system* of telecommunications that remains and must always be nurtured and protected as public resource, not assigned addresses. For those readers still in denial, consider the folly of the USPS attempting foreclosure proceedings under the theory that a specific mailing address is a "public resource" and must be reclaimed. If the Commission is to ensure that the "allocation of toll-free numbers [remain] a fair and equitable process," then it must ensure that all companies and programs are afforded equal protection – even those in their infancy!

### ADEQUACY OF USE

Once a toll-free number is assigned, the Commission should not involve itself in the adequacy of use, i.e. "the amount of calling of a particular number." This discriminatory assessment would be analogous to the USPS engaging in "red lining" or offering mail delivery only where the volume deems it to be profitable. The courts, too, decline to rule on the adequacy of compensation where a contract is otherwise valid. Further, the Commission ruled that a \$0.70 monthly fee is incentive enough to use numbers wisely (i.e., "*incentives already exist for using PIN*"); how then can the Commission establish a double standard requiring targeted subscribers to justify the volume of use – or share proprietary business plans -- with an agency that has no authority to ask?

### THE 888 AUCTION FOLLY AND BEYOND

Finally, it should be abundantly clear that the proposed auction of confusingly similar 888 vanity numbers will be immediately enjoined and ultimately disallowed by the courts. The Commission has one thing absolutely correct: toll-free numbers have *no inherent value*. Rather, it is the intellectual property overlaid by the 800 holders that is reportedly worth \$700 million. An auction of these proprietary rights would be unconscionable (see *888-Get-Real* attached). The Commission would be wise to educate Congress and save everyone from this expensive, protracted litigation. Subsequently, the entire pool of 888 numbers should be released on the "first refusal" basis promised – without charge.

It should come as no surprise that public confusion between 800 and 888 will endure for generations, as 800 numbers have become *synonymous* with toll-free. Far more troubling is the confusion that will ensue when 877 and other toll-free numbers begin to look like local area codes. Just imagine the backlash from residential customers who field misdirected calls at all hours of the night in the 847, 807, and, perhaps, 887 area codes!

The better solution would be to abandon the doomed policy adopted by the "industry" and to accelerate the release of *portable* 500 numbers and, perhaps 700 numbers. The Commission should then seek comment on the creation of vanity SAC's (see *Comments and Reply Comments of Vanity International*) or a purely numeric solution like *express prompting*; an *optional* set of single-digit prompts entered *before* (express) or *after* (voice prompt) call completion. The express prompting solution would make each toll-free number -- and each local number for that matter -- ten times more useful *without* damaging existing intellectual overlays.

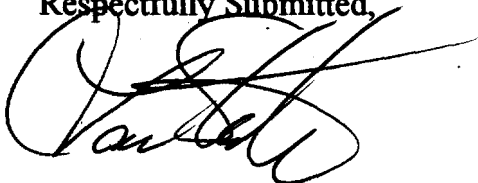
The primary advantage of *express prompting* over a mandated eight-digit format is that the ten new addresses could be used or reassigned *only* by the existing subscriber. Many companies would then elect to release multiple numbers once their primary numbers serve a variety of locations and/or applications. Alternately, subscribers like 800-Flowers can *opt out* of the feature and stay with the seven-digit call format that spells their name. From the consumer perspective, the transition is painless; dialing the traditional seven digits will – at worst – be intercepted by a voice prompt to guide them through any additional choices. From a business perspective, each number is ten times more powerful. Problem solved.

Recognizing that any change in the system will be time consuming and expensive, the Commission would be wise to seek a permanent solution that is both more desirable and less confusing than the existing quagmire.

### CONCLUSION AND RECOMMENDATION

The Commission would best serve the public interest by maintaining a regulatory environment where the next 800-Flowers will be nurtured and protected from big business interests. In my view, the Commission's role is to adopt policies that encourage toll-free business development as it has done in radio licensing and HDTV. The present language in the Report and Order will only serve to deter investment and stifle business development and should, therefore, be immediately stayed until a more rational and equitable approach is employed.

Respectfully Submitted,



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*Please give this petition full force and effect of those received during the 30-day period. We were advised that the Memorial holiday extended the due date until today.*

# InfoText<sup>®</sup>

## Integrating Commerce and Communications

May-June '96

## 888-Get-Real

By Loren Stocker

**R**ecent media coverage on the 888 vanity numbers auction proposed in the 1997 Federal Budget has glossed over the very heart of the matter, and it's time to dispel some of the myths. Well over half of the 375,000 numbers set aside by American businesses are not vanity numbers -- they are just good numbers with little or no inherent value.

Of those that are vanity numbers, the media consistently presents 888-Flowers or 888-Mattress as representative samples, but these seemingly generic ones are precious few in number.

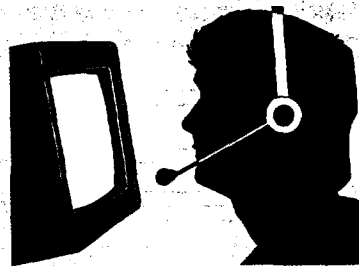
Most vanity numbers in the pool are highly proprietary. Numbers like 888-Call-IBM and 888-CitiBank are far more typical and it should be clear to everyone that an auction of these would be unconscionable, yet that's the plan.

In addition, numbers were set aside under the premise that a competitive bidding process might be employed if right of first refusal "is allowed," according to the FCC Notice of Proposed Rulemaking 95-155.

Presumably, then, IBM, CitiBank and others would stand aside while the government auctions off their properties,

then buy them back at the high bid. If all this sounds familiar, it should; it's called extortion.

I confidently use the phrase "their properties" because the only reason these numbers have any value at all is because IBM, CitiBank and others created it. The phone companies only issue plain numeric codes; look at your bill. Vanity numbers, the messages



overlaid on the numeric codes, are exclusively created by subscribers. If you're still in denial, recognize that all other vanity 888 numbers are free for the asking, including the newly created StarTAC, Keg-Beer, and even Wall-Street.

Since auctioning airwave rights has raised a fortune, it is understandable

that some would try to extend the concept to vanity numbers. However, while frequencies may be transparent to the end user, vanity numbers are not. Inherently, 888 numbers will always be confused with their 800 counterparts. They're just too much alike.

A better solution would be for the government to do for toll free what the private sector did for numeric codes - create vanity exchanges. Toll free exchanges like FAX, SKY, CAR, USA, WEB, NET, FOR, GET and others could be created and auctioned off without affecting anyone! It should be clear that USA-Mattress or GET-Flowers could hardly be confused or contested by established services like 800-Mattress and 800-Flowers.

With the American imagination, millions of unique, powerful vanity numbers could be crafted on these platforms - like USA-Get-Real - and millions of honest dollars raised in the process.

*Loren C. Stocker is managing partner of Vanity International, a Chicago-based consulting firm that creates, secures and applies vanity numbers.*